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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1113

EDDIE J. VIATOR,

Appellant,

vs.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION FOR REHEARING.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant.

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Comes now the above named Appellant, and Petitioner, Eddie J. Viator, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. Appellees were without jurisdiction of the subject-matter, and, their lack of jurisdiction overwhelmingly appearing of record, their Final Order of May 24th, 1941, approving the two additional sales tax assessments against appellant, petitioner, is null and void, and the jurisdiction of the lower court being assailed, that matter is a proper question for appeal, and certiorari, and for argument, when this case is reached on the regular call of the docket of this Honorable Court.

2. Appellees having failed to accord appellant procedural due process of law, their action is null and void, and violates the Fourteenth Amendment to the Constitution of the United States.

3. Appellees having failed to conform to the essential requirements of fair play, and due process of law, their action is arbitrary and in conflict with the Fourteenth Amendment, the purpose of which is to guard against impairment by State action.

4. Appellees have failed to perform the duties specifically enjoined upon them by law.

5. Appellees failed to pursue the authority conferred upon them in the mode required by Section 6, Chapter 113, Laws of Mississippi of 1938, and Section 1, Chapter 150, Laws of Mississippi of 1938, to authorize and empower them to make the determination of additional sales tax allegedly due by petitioner.

6. Appellees violated fundamental rules of law affecting the rights of petitioner, as a citizen of the United States, in making their determinations and assessments against petitioner, to the prejudice of petitioner, in violation of the Fourteenth Amendment to the Constitution of the United States, depriving petitioner of due process of law and the equal protection of the law, and the effect of the Final Order of May 24, 1941, if permitted to stand, will take the property of petitioner without due process of law.

7. Appellees failed and refused to offer any competent proof of all the facts necessary to be proved in order to authorize the making of the additional sales tax assessments against petitioner.

8. Appellees failed and refused to make a basic finding of fact, based upon substantial evidence of record, thus

permitting the exercise of arbitrary power, condemned by the Fourteenth Amendment to the Constitution of the United States.

9. Appellees failed and refused to make a "report in writing, setting forth a review of the cause and the essential facts of the matter", required by Section 1, Chapter 150, Laws of 1938 of Mississippi, and the principles of Constitutional government.

10. The statutes involved in this cause, Section 6, Chapter 113, Laws of Mississippi of 1938, and Section 1, Chapter 150, Laws of Mississippi of 1938, as construed and applied by appellees, the Circuit Court of Hinds County, and the Supreme Court of Mississippi, deny petitioner due process of law.

11. The basis of fact upon which the State court has rested its decision, denying the asserted Federal rights of appellant, being without any support in the record, it is the right and duty of this Honorable Court to review and correct the error.

12. The additional assessments for sales tax against appellant, petitioner, do not follow realities, upon which taxes must be based, but mere deductions from inadequate and irrelevant data.

13. Certiorari was the proper remedy of appellant, petitioner, to correct mistaken findings of fact induced by an error of law appearing on the record, the finding of a fact contrary to law, and the making of an order contrary and beyond the power of appellees.

14. The proviso contained in Section 6, Chapter 113, Laws of 1938, must be read in connection with, and as part of the whole, and is as much a part of the statute as any sentence or clause, thereof.

15. The Federal right asserted by appellant, petitioner, was erroneously decided by the State court, the decision of the Federal right was necessary to the determination of the cause, and the judgment of the State court, as given, could not have been reached without deciding it.

16. The opinion of the State court assumes as true what does not appear of record. The opinion of the State court is put upon the ground that evidence is not before the court upon certiorari, whereas the charge of lack of evidence to support the Order made is a question of law. The State court holds that appellant was given an opportunity to overcome by evidence the facts upon which the additional assessments were made, whereas the record shows the assessments were not based on facts, but upon deductions from inadequate and irrelevant data, and thus the rule of law that taxes must follow realities, was violated. The reasons assigned for the judgment of the State court are not broad enough to sustain it. The asserted Federal right on the part of appellant, petitioner, was actually considered by the State court, and decided against appellant, petitioner.

17. Section 6, Chapter 113, Laws of Mississippi of 1938, being the only statutory provision of the State permitting additional assessments for sales tax to be made "from the best information available", and the additional sales tax assessments against appellant, petitioner, shown by Registered Notice of December 8, 1939, (R. 100, 106-7, 130-130) and Exhibits "E" and "F" to Appellant's petition for writ of certiorari, having been made, according to the language of the Registered notice, required by Section 6," * * * from the best information available in addition to the previous returns and payment of sales tax heretofore made by you for the periods January 1, 1937 to December 31, 1937 and January 1, 1938 to December 31, 1938, by reason of the fact that the records kept by you were not adequate to

determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for the said respective years, * * *", jurisdiction of appellees to so proceed against appellant, petitioner, must be confined to the statutory delegation, and none other, and must affirmatively appear of record, and Section 6 of the statute must prevail over all other sections of the statute.

18. The requirement of Section 6, Chapter 113, Laws of 1938, following the filing of petition by taxpayer, that "* * * the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section" is mandatory, and must be followed. Since appellees failed and refused to "investigate that question fully", they failed to afford appellant, petitioner, procedural due process of law; they failed to do their statutory duty. Their order against appellant, petitioner, is contrary to and beyond their power. Their actions were approved by the Supreme Court of Mississippi. The statute as thus construed and applied against appellant, petitioner, is unconstitutional, null and void, and violates the Fourteenth Amendment to the Constitution of the United States.

19. The prima facie case against a taxpayer who fails to maintain adequate records and preserve invoices for a period of two years, provided by Section 6, Chapter 113, Laws of 1938, is made to depend upon "such returns and assessments" provided for and required by the statute in such cases made and provided. The statute provides "the commissioner may make additional returns and assessments from the best information available, and shall give notice by registered mail of such returns and assessments, and such returns and assessments shall be prima facie correct

for the purpose of this act * * * ". Nowhere in the record do the returns and assessments appear. They are conspicuous by their absence. The formalities required by the statute were not adhered to. Appellees have failed to make out a case against appellant. This Honorable Court should review the record and correct the error, and set aside the judgment of the Supreme Court of Mississippi.

20. The judgment appealed from is a final judgment of the highest court of the State of Mississippi in which a decision in the suit could be had, the validity of Section 6, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, as construed and applied, on the ground of being repugnant to the Constitution of the United States, is drawn in question, and the decision of the Supreme Court of Mississippi is in favor of their validity, and this Honorable Court has jurisdiction of this cause on appeal by virtue of Section 237(a) of the Judicial Code, as amended, and by certiorari by virtue of Section 237(b) of the Judicial Code, as amended, and treating the papers whereon the appeal was allowed as a petition for certiorari, pursuant to Section 237(c) of the Judicial Code, as amended, this Honorable Court should regard and act on the papers as a petition for writ of certiorari, and it is respectfully submitted, grant Writ of Certiorari, and require that there be certified to it for review and determination, with the same power and authority and with like effect as it brought up by appeal, the record of this cause, for further proceedings in this Honorable Court, so that right and justice may be done to Petitioner.

21. Petitioner denied that he failed to maintain adequate records and preserve his invoices for a period of two years, and thus there was a denial of a jurisdictional fact. Without violation of the Due Process clause of the Federal constitution, he cannot be proceeded against without a

judicial, as distinguished from a mere administrative trial of the fact of adherence to the sales tax law of the State of Mississippi.

22. No court, save that of final authority, has the power to be the arbiter of its own jurisdiction, and this Honorable Court, as the Court of final authority in the United States, should review the record of this cause and determine for itself whether appellees had jurisdiction of the subject-matter against appellant, petitioner, and, if having jurisdiction of the subject-matter, they acted beyond their jurisdiction, and contrary to the constitutional rights of petitioner.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of Mississippi be, upon further consideration, reversed.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant, Petitioner.

Certificate of Counsel.

I, Albert Sidney Johnston, Jr., Counsel for the above-named Eddie J. Viator, appellant, petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant.